

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PRO PUBLICA, INC.,	:	
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	:	
Plaintiff,	:	
	:	<u>COMPLAINT</u>
- against –	:	
	:	
INTERNAL REVENUE SERVICE,	:	CIVIL ACTION NO.: 19-CV-7464
	:	
Defendant.	:	
	:	
_____	X	

Plaintiff PRO PUBLICA, INC., (“ProPublica”), by its undersigned attorney, alleges for its Complaint:

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the disclosure of records related to the renewal of a special, secretly negotiated government agreement with the tax preparation industry to prevent the creation of free tax-filing software by Defendant Internal Revenue Service (“IRS”) that could save American taxpayers billions of dollars in fees.

2. This renewal was the subject of direct lobbying by tax industry representatives and officials outspoken in their desire to maintain this agreement without significant change, despite harsh criticism from, among many others, the National Taxpayer Advocate and multiple members of Congress. The agreement is an important one for the industry: In exchange for agreeing to provide privately developed free options, the tax preparation companies ensure that the IRS does not develop its own, potentially popular, free software.

3. A tremendous amount of money is at stake: Only 2-3 percent of all taxpayers eligible to file their taxes for free online through the IRS agreement actually do so; many of the

rest unnecessarily pay hundreds of dollars in fees each to companies like industry leader Intuit (the maker of TurboTax) that provide paid versions of their products that are functionally identical to truly free offerings.

4. As ProPublica has reported, this seemingly irrational use of money is no accident. Intuit has deliberately hidden its truly free offering, adding code to its websites to make it invisible to search engines, and using confusing product names and misleading advertising to trick those looking for the truly free option, all the while professing technical compliance with the special agreement with the IRS, known as the Free File program.

5. ProPublica seeks records at the heart of the industry's efforts to persuade the IRS to keep this arrangement afloat. Its request seeks emails between industry advocates (both Intuit officials and trade group representatives) and three specifically named top IRS officials working on Free File during a crucial period of negotiation.

6. Despite the obvious public interest in these records, and even clearer caselaw mandating the release of documents between government officials and self-interested third parties, the IRS has refused to disclose them. ProPublica is entitled to their immediate release.

PARTIES

7. Plaintiff ProPublica is a non-partisan newsroom based in New York. It is a Delaware non-profit corporation and is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. As an independent news organization dedicated to producing investigative journalism in the public interest, it has been honored with numerous awards, including five Pulitzer Prizes. ProPublica publishes its reporting through its website, www.propublica.org, and in partnership with more than 190 news organizations across the country, including The New York Times, The Washington Post, Politico, NPR News, The Miami

Herald, The New Yorker, The Boston Globe, The Los Angeles Times, and Frontline. ProPublica is headquartered in this judicial district at 155 Avenue of the Americas, 13th Floor, New York, New York 10013.

8. Defendant IRS is an agency of the federal government that has possession and control of the records that Plaintiff seeks. It is headquartered at 1111 Constitution Avenue NW, Washington, D.C. 20224.

JURISDICTION AND VENUE

9. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 5 U.S.C. § 552(a)(4)(B).

10. Venue is premised on the place of business of Plaintiff and is proper in this district under 5 U.S.C. § 552(a)(4)(B).

11. Plaintiff has exhausted all administrative remedies available. The IRS denied ProPublica's timely filed administrative appeal in its entirety, and therefore Plaintiff is entitled to seek judicial review of that denial pursuant to 5 U.S.C. § 552(a)(4)(B).

FACTUAL BACKGROUND

A. The Free File Program

12. Beginning with the IRS Restructuring and Reform Act of 1998, the federal government has ostensibly sought to reduce the cost and inefficiency of income tax filing by encouraging the development of electronic tax filing.¹ That law set a goal of 80 percent of all tax returns being filed electronically as soon as 2007.

13. The administration of President George W. Bush initially sought to extend this effort even further by having the IRS develop *its own* digital income tax return to dramatically

¹ IRS Restructuring and Reform Act of 1998, Pub. L. No. 105-206, 112 Stat. 685.

expand taxpayer access to a free filing option.² The IRS elected instead to come to an agreement with a consortium of private tax preparation software companies to develop their own free services. This consortium is known as the Free File Alliance, with the agreement to be renegotiated every few years.

14. The first agreement to create the Free File program was signed on October 30, 2002. In exchange for the IRS consenting to forego development of its own software option, the consortium of private companies agreed to provide free online tax preparation services for 60 percent (now 70 percent) of all taxpayers.

15. The number of taxpayers taking advantage of Free File expanded dramatically, with a 46 percent increase from the prior year to 5.1 million free filed returns in 2005 alone. Importantly, some members of the consortium made their Free File software available to *all* eligible taxpayers.

16. Such growth and expansive offerings were short-lived, as profits were threatened. Beginning with the 2005 renegotiation of the Free File agreement, the consortium won significant limitations to the program. Most importantly, the agreement now placed a hard cap on the income levels of eligible taxpayers.

17. Over time, the already limited advertising budget set aside for the program – numbering in the low millions – was eliminated completely.

18. Strikingly, the number of taxpayers using programs through the Free File agreement has plummeted, despite the fact that internet usage and sophistication among the general public has advanced considerably since 2002. While 5.1 million taxpayers used Free

² See, e.g., Nat'l Taxpayer Advocate, Annual Report to Congress 2018 Volume 1, at 66, available at https://taxpayeradvocate.irs.gov/Media/Default/Documents/2018-ARC/ARC18_Volume1.pdf.

File in 2005, only 2.7 million did so in 2018. More than 131 million other tax returns were filed electronically that same year.

B. ProPublica's Reporting and Exposure of Intuit's Deceptive Tactics to Depress Free File Usage

19. ProPublica has reported on the Free File program, and the extensive industry lobbying effort to prevent the IRS from developing its own free software tool, since 2013.³

20. These stories detailed how many other countries around the world provide free, government-run tax filing tools; how Intuit has facilitated “grassroots” campaigns to prevent efforts to change the Free File arrangement;⁴ and how tax preparation companies have spent millions on direct lobbying to preserve a lucrative business line.⁵

21. This year, ProPublica uncovered many of the intentionally deceptive tactics used by Intuit to help ensure that only a small percentage of taxpayers eligible to use the Free File program actually use it.

22. The tactics are remarkable. The reporting showed that Intuit developed a parallel product, confusingly called the “Free Edition.” But the “Free Edition” was not the “Free File Edition” – indeed, the Free Edition upsold users who, for example, need certain fairly common

³ Liz Day, *How the Maker of TurboTax Fought Free, Simple Tax Filing*, ProPublica (March 26, 2013), <https://www.propublica.org/article/how-the-maker-of-turbotax-fought-free-simple-tax-filing>.

⁴ Liz Day, *TurboTax Maker Linked to 'Grassroots' Campaign Against Free, Simple Tax Filing*, ProPublica (April 14, 2014), <https://www.propublica.org/article/turbotax-maker-linked-to-grassroots-campaign-against-free-simple-tax-filing>.

⁵ Jessica Huseman, *Filing Taxes Could Be Free and Simple. But H&R Block and Intuit Are Still Lobbying Against It.*, ProPublica (March 20, 2017), <https://www.propublica.org/article/filing-taxes-could-be-free-simple-hr-block-intuit-lobbying-against-it>.

tax forms, to a *paid* product. The Free Edition did not redirect users to the Free File Edition, which would have provided the same service at no cost for many people.⁶

23. The reporting also showed that Intuit, as well as tax preparation company H&R Block, actively sought to prevent internet users using common search engines like Google from finding the companies' (truly free) Free File offerings.⁷ In fact, the companies added code to their websites that meant that those pages would not come up in search results. Under public pressure following the story, Intuit reversed course.

24. Following ProPublica's reporting, the Free File program has been the subject of bipartisan calls in Congress for further scrutiny, including by chairpersons of the committees that oversee the IRS.⁸ And an effort to codify the Free File agreement into law was stripped out of a pending IRS reform bill.⁹

⁶ Justin Elliott and Lucas Waldron, *Here's How TurboTax Just Tricked You Into Paying to File Your Taxes*, ProPublica (April 22, 2019), <https://www.propublica.org/article/turbotax-just-tricked-you-into-paying-to-file-your-taxes>.

⁷ Justin Elliott, *TurboTax Deliberately Hid Its Free File Page From Search Engines*, ProPublica (April 26, 2019), <https://www.propublica.org/article/turbotax-deliberately-hides-its-free-file-page-from-search-engines>.

⁸ See, e.g., Naomi Jagoda, *Grassley, Wyden urge IRS to review 'Free File' memo with tax-prep companies*, The Hill (May 6, 2019), <https://thehill.com/policy/finance/442402-grassley-wyden-urge-irs-to-review-free-file-memo-with-tax-prep-companies>.

⁹ See, e.g., Naomi Jagoda, *Lawmakers expected to offer new version of IRS bill without 'Free File' provision*, The Hill (June 5, 2019), <https://thehill.com/policy/finance/447079-lawmakers-expected-to-offer-new-version-of-irs-bill-without-free-file>.

25. The Free File program, and Intuit, are now the subject of various ongoing lawsuits, reviews, and investigations, including by the IRS, the Treasury Department Inspector General for Tax Administration, and the New York State Department of Financial Services.¹⁰

C. ProPublica's FOIA Request

26. The Free File program was most recently renegotiated in 2018, with a new agreement signed in October of that year.

27. This renegotiation process involved extensive back and forth, including by email, between IRS officials and various representatives of Intuit and the Free File Alliance, which represents industry interests.

28. The renegotiation was concluded just weeks before the IRS Advisory Council, an expert body tasked by the agency to assess the Free File program, issued its 2018 annual report to the IRS Commissioner. That report concluded, “The IRS’s deficient oversight and performance standards for the Free File program put vulnerable taxpayers at risk, and make it difficult to ensure that [Free File Alliance] members are upholding their obligation to provide tax preparation and e-filing services ‘to economically disadvantaged and underserved populations at no cost to the individual or the government.’”¹¹

¹⁰ See, e.g., Justin Elliott, *New York Regulator Launches Investigation Into TurboTax Maker Intuit and H&R Block*, ProPublica (May 10, 2019), <https://www.propublica.org/article/turbotax-maker-intuit-h-r-block-new-york-regulator-launches-investigation>; Justin Elliott, *Senior IRS Leaders Launch Review of Partnership with TurboTax and H&R Block*, ProPublica (May 6, 2019), <https://www.propublica.org/article/senior-irs-leaders-launch-review-of-partnership-with-turbotax-and-h-r-block#>; Andrew Blankstein and Anne Thompson, *Los Angeles city attorney sues H&R Block and maker of TurboTax for allegedly misleading low-income taxpayers*, NBC News (May 6, 2019), <https://www.nbcnews.com/business/taxes/los-angeles-sues-h-r-block-maker-turbotax-allegedly-misleading-n1002576>.

¹¹ Internal Revenue Serv. Advisory Council, Public Report (November 2018), Publication 5316, at 14, <https://www.irs.gov/pub/irs-pdf/p5316.pdf>.

29. To better understand this renegotiation process, on April 22, 2019, ProPublica and its reporter Justin Elliott submitted a FOIA request to the IRS (the “Request”).

30. The Request sought:

[A]ll emails dated between May 1, 2018, and the present, up to and including the date this FOIA is processed, between (to or from) the following IRS officials

- Ken Corbin, Commissioner, Wage & Investment Division
- David Alito, W&I Deputy Commissioner
- Terry Lemons, Communications and Liaison

and the following outside lobbyists and advocates:

- Tim Hugo, Free File Alliance (has at least two emails: tim.hugo@freefilealliance.org; tim.hugo@capnet.org)
- Vickie Hull, FFA (vickie.hull@freefilealliance.org)
- anyone with the email domain @intuit.com, including but not limited to
 - Bernard McKay, Chief Public Policy Officer, Intuit
 - Melissa Netram, Director Corporate Affairs, Intuit.

31. On July 9, 2019, the IRS issued a partial denial of the Request. In the partial denial, the IRS released 16 pages, of which seven pages were partially redacted. The IRS further withheld 107 pages in their entirety. The IRS justified most of its withholdings under FOIA Exemption 5, which applies to inter- or intra-agency records. Specifically, the agency cited the deliberative process privilege.

32. On July 15, 2019, Plaintiff timely filed an administrative appeal of the partial denial.¹² In its appeal, Plaintiff cited caselaw stating that Exemption 5 simply does not apply to

¹² Plaintiff did not challenge limited redactions made pursuant to FOIA Exemptions 6 and 7(E) in the documents that were released in response to the Request. To the extent that redactions based on these exemptions in the unreleased documents are not materially different in nature from those in the released documents, Plaintiff does not challenge them here. As Plaintiff does not know the content of the unreleased documents, it reserves the right to amend this Complaint if further information becomes known.

correspondence exchanged between an agency and self-interested third parties, particularly where those third parties wish to obtain something from the government. *See, e.g., Levy v. Postal Serv.*, 567 F. Supp. 2d 162, 166 (D.D.C. 2008) (“Information concerning an interactive process between an agency and an outside third party is not deliberative in nature, because such information is no longer secret and cannot advance the policy objectives that Exemption 5 is intended to serve.”).

33. On July 22, 2019, the IRS denied the administrative appeal in its entirety. The IRS did not respond directly to Plaintiff’s arguments. Instead, the IRS denial asserted that, “The pages redacted and withheld meet the ‘deliberative’ requirement of the privilege because they demonstrate projections and recommendations.”

34. The few partially redacted documents that have been released in response to the Request suggest the renegotiation process involved extensive exchanges between IRS officials and industry advocates, including a demand for “urgency” by the industry, which is notable given the pending critical IRS Advisory Council report. The documents also include an assurance sent from an IRS official to a lawyer for the Free File Alliance stating that an IRS Advisory Council member who had written an unfavorable op-ed would not be part of the review process. The remaining exchanges may involve additional efforts by industry advocates to protect corporate concerns.

COUNT I

35. Plaintiff repeats, realleges, and reincorporates the allegations in the foregoing paragraphs as though fully set forth herein.

36. Defendant IRS is subject to FOIA and must therefore release in response to a FOIA request any disclosable records in its possession at the time of the request and provide a lawful reason for withholding any materials as to which it is claiming an exemption.

37. Plaintiff has exhausted all administrative remedies, having filed an administrative appeal that was denied. Plaintiff is therefore entitled to seek judicial review of that denial pursuant to 5 U.S.C. § 552(a)(4)(B).

38. There is no lawful basis under FOIA for the IRS's claimed exemption for withholding or redacting documents sought by the Request.

39. Even if parts of the requested documents are properly subject to an exemption, the IRS has an obligation to redact non-disclosable portions of the documents and release those portions that are disclosable under FOIA.

40. The IRS's failure to produce responsive documents, both in whole and in part, violates FOIA.

41. According, Plaintiff is entitled to an order compelling the IRS to produce the documents sought by the Request.

REQUESTS FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

42. Declare that the documents sought by its FOIA requests, as described in the foregoing paragraphs, are public under 5 U.S.C. § 552 and must be disclosed;

43. Order the IRS to provide the requested documents to Plaintiff within 20 business days of the Court's order;

44. Award Plaintiff the costs of this proceeding, including reasonable attorneys' fees, as expressly permitted by FOIA; and

45. Grant Plaintiff such other and further relief as this Court deems just and proper.

Dated: New York, New York
August 9, 2019

/s/
Jeremy A. Kutner, Esq.
Deputy General Counsel
ProPublica
155 Avenue of the Americas, 13th Floor
New York, NY 10013
Phone: (917) 512-0218
Fax: (212) 785-2634
E-mail: jeremy.kutner@propublica.org
Counsel for Plaintiff